

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: February 12, 2001
Case Nos: 2000-INA-246

In the Matter of:

LORD'S DELI & PIZZA
Employer

On Behalf of:

JOSE BERMEJO
Alien

Appearance: Ann L. Ritter, Esq.
for the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York City, New York

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Jose Bermejo ("Alien") filed by Employer Lord's Deli & Pizza ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers

similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On August 21, 1996, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Morning Cook, Deli & Pizzeria.

The duties of the job offered were described as follows:

Prepare season and cook breakfast specialties such as Feta Cheese Omelette, Spanish Omelette, Western Omelette, French Toast, Pancakes. Measure, mix ingredients. Flip, fold, turn eggs, french toast, pancakes. Add fillings, seasonings. Use frying pans, mixers, grill. Test for doneness.

No formal education and two years experience in the job, or the related job of Prep Cook were required. Wages were \$15.03 per hour. The applicant supervises 0 employees and reports to the Chef. (AF-1-31)

On October 4, 1999, the CO issued a NOF proposing to deny certification. The CO found the job duties described were for a short order cook, and not a morning cook as set out in the Dictionary of Occupational Titles, and, therefore, the requirement of two years of experience in the job offered or in the related job was not justified. Employer's submitted documentation of a location in Greenwich Village was not accurate since the location actually was closer to the financial district in New York, where breakfasts do not carry through 2:00 p.m. as alleged by Employer. Also, the copies of prior applications accepted as morning cooks was not applicable since the Employer in those cases were manufacturers of frozen pre-cooked breakfasts and not a deli and pizza shop. The CO required the Employer to document that the job requirements arose from a business necessity and that the job existed before the alien was hired or that a major change in the business operation caused the job to

be created in order to rebut her findings; or, alternatively to delete the requirement and readvertise. (AF-33-35)

On December 7, 1999, Employer forwarded its rebuttal contending that the job was not a short order cook as set out under 313.374-014 of the D.O.T. but rather those of a Morning Cook as set out under 313.361-014. The Employer went into an extensive discussion of the preparation necessary to cook, for example, a spanish omelette, and its culinary aspects. Employer agreed that the establishment was not in Greenwich Village but rather the Battery section of New York, which required catering to unorthodox tastes at all hours. Employer further noted that the premises seated 36, and delivered meals much as most restaurants do in New York and that the name of Deli and Pizza shouldn't detract from the cooking it now does. (AF-37-42)

On January 7, 2000, the CO issued a Final Determination denying certification, stating: "We do not accept Employer's evaluation of this position. The basic difference between the 'short order cook' and a 'cook' is that the 'short order cook' cooks food requiring a short preparation time. Some measuring and mixing of ingredients is common in any kind of cooking. Slicing and dicing of ingredients is typically done ahead of time and available for a cook to use as necessary. It is also a typical duty for any kind of cook and does not normally take a long time to learn. Employer's menu contains breakfast specials commonly found in most diners. While the quality of employer's food may be good, nowhere on his menu does it state these are gourmet breakfasts. The use of frying pans, mixers and grills are typically used by short order cooks as is preparing omelettes, French Toast and Pancakes. Employer felt it is not a position with restrictive requirements and failed to prove the job existed and was previously filled with the same job duties and requirements before the alien was hired. Nor has the employer amended his experience requirements as directed... While employer's establishment may require experience higher than normal for this position, he failed to document the need for his required two years experience." (AF-43,44)

On February 8, 2000, the Employer filed a request for review of denial of labor certification. (AF-45,46)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal,

the matters are deemed to be successfully rebutted and are not at issue before the board. Barbara Harris, 1988-INA-32 (1989)

The primary reason given in the Final Determination for denial of labor certification was that the job opportunity described was that of a "short order Cook", whereas Employer alleges it is a "Morning Cook". The job duties as described are not themselves in substantial dispute. The D.O.T.313.374-014 defines a short order cook as follows:

Prepares food and serves restaurant patrons at counters or tables: Takes order from customer and cooks foods requiring short preparation time, according to customer requirements. Completes order from steamtable and serves customer at table or counter. Accepts payment and makes change, or writes charge slip. Carves meats, makes sandwiches, and brews coffee. May clean food preparation equipment and work area. May clean counter or tables.

Under "Cook" the D.O.T. 313.361-014 reads:

COOK (hotel & rest.) Alternate titles cook, restaurant Prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperatures of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment such as blenders, mixers, grinders, slicers and tenderizers, to prepare soups, salads, gravies, desserts, sauces casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests food being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [Baker(hotel & rest.) 3132.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.): or according to food item prepared as Cook, Roast (hotel & rest.) according to method of cooking, as Cook, Broiler (hotel & rest.) May substitute for and

relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital.

Employer's rebuttal alleges, and it has not been demonstrated otherwise, that the position to be filled does not take orders, accept payment and make change or write charge slip as is provided under the D.O.T. description of a short order cook, but only does the cooking. The Employer noted the seating for 36 in addition to take out of hot meals, the long term reputation of the restaurant for quality, individually prepared, gourmet style food and compared that with short order cooks who do little or no food preparation. Employer went into great detail to describe the preparation necessary for such items as a Spanish or Western omelette, and the various flavors of pancakes as well as the proper cooking of such items. Employer maintained that the name "Lord's Deli & Pizza" may have at one time suggested a fast food restaurant, but that was no longer the case.

The "Cook" designation permits various specialties within the category, including such obviously singularly focused ones as "sauces" and "soups". Although the D.O.T. provides for numerous types of cooks, the "Cook" category as defined above under 313.361-014 is the only category that provides for a specialty of "morning cook". The fact that this D.O.T. job title mentions numerous other specialties might indicate that the restaurant envisioned would be so large and oriented toward a variety of customers with gourmet tastes (such as the Plaza Hotel dining room, or Tavern-on-the-Green) does not mean that it intended to exclude other restaurants that might cater to only one or a few of the various specialties.

We are mindful that the D.O.T. is merely a guideline and should not be applied mechanically. Promex Corporation, 1989-INA-331 (Sept. 12, 1990); Potomac Pizza, 2000-INA-83 (May 15, 2000). Moreover, we note that the CO could have raised the issue of years or months of required experience in another manner, for example, that the job opportunity was akin to a "Cook, Specialty" 313.361-026, or "Cook, Fast Food", 313.374-010. Further, it may be true that the restaurant in question may have lunch meals prepared and served by a "Cook, Short Order". Moreover, the CO could have alerted the Employer that the job opportunity was not

clearly set out in D.O.T. and, therefore, Employer would need justify the two year experience requirement. (See, Marcello's Pizza, 1997-INA-155 (March 19, 1998) However, the CO's insistence that Employer's job opportunity for one who prepared breakfasts was a short order cook and acceptance of no explanations to the contrary does not adequately address the fact pattern alleged by Employer, which has not been directly contradicted by the CO. In fact the CO's analysis appears to dispute that there is such a position as "morning cook".

Similarly, since it was not raised by the CO's NOF, we need not address the issue of "alternative qualifications". We do note, however, that this case would appear to be squarely addressed by the Board's decision in Francis Kellogg, 1994-INA-465; The Winner's Circle, 1994-INA-544; and North Central Organized for Total Health, 1995-INA-68, (en banc)(Feb. 2, 1998) wherein the Board held that: "Permitting an employer to advertise with qualifications greater than that possessed by the alien, but allowing the alien to qualify with lesser qualifications which are listed in the guise of 'alternate' qualifications, is a violation of 656.21(b)(5)." Under Kellogg which overruled Best Luggage and its progeny, Employer's alternate job experience of "Prep Cook,(Breakfasts)" as qualifying experience for the position advertised of "Cook, Morning" would appear to be not lawful. We repeat, however, that this issue was not raised by the CO in her NOF thus depriving Employer of opportunity to rebut, for example, by deleting the alternative qualification or demonstrating alien's other experience (if any).

Under the circumstances, and given the long period of time that has passed since the matter was first initiated we believe granting of labor certification rather than remand is the proper remedy despite the narrow nature of our decision. Harris, supra.

ORDER

The Certifying Officer's denial of labor certification is REVERSED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

Vittone, Chief Administrative Law Judge, dissenting

In Marcello's Pizza, 1997-INA-155 (Mar. 19, 1998 (per curiam)), Employer was a restaurant/pizzeria seeking to fill a cook position. The Employer sought to categorize the position under the DOT definition for a "Cook, Specialty, Foreign Food," which justifies a two to four year experience requirement, while the Certifying Officer concluded that the position was best categorized under the DOT definition for "Cook, Specialty," which only justified a 6 month to one year experience requirement. The BALCA panel concluded that the job did not precisely fit either DOT definition, and, noting that the DOT is only a guideline, analyzed the case under the standard business necessity test of 20 C.F.R. 656.21(b)(2). Under that test, the Board concluded that Employer had not provided detailed enough documentation to establish how its specific duties required two years of experience to be able to perform those duties.

The majority holds that the CO could have alerted Employer in the instant case that the job was not clearly set out in the DOT, and therefore Employer would need to justify business necessity as in Marcello's Pizza, supra. In this case, the CO did require in the Notice of Findings that Employer establish business necessity